# Petition

Office - Supreme Court, U.S.
FILED
MAR 12 1982
ALEXANDER L. STEVAS
CLERK

81-1689

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1981

ROY HUEY, in behalf of himself
and all other persons similarly situated,
*Petitioner,*

vs.

TELEDYNE, INC., et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID DAAR
MICHAEL R. NEWMAN
of MILLER & DAAR, P.C.
9100 Wilshire Boulevard
Suite 720 - East Tower
Beverly Hills, California 90212
(213) 550-7236
*Counsel of Record*

and

ERWIN SOBEL
of LAW OFFICES OF ERWIN SOBEL
8383 Wilshire Boulevard
Suite 210
Beverly Hills, California 90211
(213) 653-8470
*Attorneys for Petitioner*

## QUESTIONS PRESENTED

(a) Is due process and equal protection of the laws denied under the Fifth Amendment, where certification of a class has been denied thousands of common stockholders of a publicly held corporation who have tendered shares in response to their company's manipulative and deceptive offer to repurchase; and where within little more than three months thereafter, the market price of the shares doubled, resulting in a $100 million windfall to the company?

(b) Does the Supreme Court's rejection of the "death knell"[1] doctrine necessitate the conclusion that the District Courts establish themselves as Federal Courts of Small Claims to needlessly proceed through trials of the representative's case as the prerequisite to the Court of Appeals reviewing orders denying class certification?

(c) Following the Supreme Court's rejection of the "death knell" doctrine in class action cases, is appellate review of interlocutory orders denying certification of the class also to be precluded where:

(1) there has been the actual final dismissal with prejudice of the individual representative's claim?

(2) there is an order of dismissal of the individual representative's claim which is an adjudication on the merits? (Rule 41(b), F.R.Civ.P.)

(d) Where the appellate court has acknowledged the hardship of requiring class representatives to proceed through trials of individual small claims cases as the prerequisite to obtaining appellate review of orders denying class certification; does such procedure also:

(1) have a chilling effect on class actions contrary to Rule 23, Federal Rules of Civil Procedure?

---

[1] In *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), the Supreme Court rejected the "death knell" doctrine, which had provided that orders denying class certification could be reviewed on appeal where it was assumed that the individual representative's claim might not survive following an order denying certification of the class.

(2) deprive the plaintiff and the class of due process, and equal protection of the laws under the Fifth Amendment?

(e) When a Court of Appeals finds that a dismissal of an action was for want of prosecution, and for that reason refuses to review interlocutory orders despite the fact that the District Court had expressly removed that ground as the basis for its dismissal, is there a denial of due process, and equal protection of the laws under the Fifth Amendment?

(f) Where the Court of Appeals vacates an order of dismissal and establishes the law of the case to be that it will thereafter review class certification orders upon entry of dismissals, for reasons other than for want of prosecution, may the appellate court after remand and on a new appeal refuse such review where the District Court expressly removed want of prosecution as the basis for dismissal?

(g) Does the procedure now being followed in the Ninth Circuit pursuant to the Opinions *Huey I* and *II*,[2] refusing appellate review of interlocutory orders in class actions even where there has been a final judgment, conflict with:

(1) the Supreme Court's decision in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed. 2d 351 (1978); and

(2) the Supreme Court's decisions in *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); *Thomsen* v. *Cayser,* 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597; *Ruff* v. *Gay,* 67 F.2d 684 (5th Cir. 1933), aff'd. 292 U.S. 25, 54 S.Ct. 608, 78 L.Ed. 1099 (1934), which held that for purposes of appellate review, interlocutory orders merge with final judgments of dismissal; and

(3) the decision of other Circuits, which similarly allow appellate review of interlocutory orders upon entry of a final judgment, including one for want of prosecution resulting from said interlocutory orders. *Allied Air Freight, Inc.* v. *Pan Am World Airways, Inc.,* 393 F.2d 441 (2d

[2] The Opinions in *Huey I* and *Huey II* are set forth in the Appendix.

Cir.), cert. denied, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968); *Drake* v. *Southwestern Bell Telephone Co.*, 553 F.2d 1185 (8th Cir. 1977).

(h) May certification be denied to a class of thousands of shareholders who responded to an offer to repurchase by an issuer:[3]

(1) where critical material information was not disclosed within the four corners of the offering circular, and such material information as was disclosed was by means of press releases to the media and filings with the Securities and Exchange Commission, and where the only direct disclosure of current financial information and other previously undisclosed material facts was in an Annual Report which was withheld from tendering shareholders until the day after the withdrawal date set in the offer and thus too late to withdraw shares which had already been transmitted?

(2) where the public company repurchasing its shares offers to accept up to one million shares and reserves the right to accept more, without disclosing that it already has the ability to, and will, tender that one million shares from a controlled source; its own employees' pension fund?

---

[3] The question raises issues pertaining to §§ 14(e) and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78n(e), 78j(b), and Rule 10b-5 of the Securities and Exchange Commission Regulations, 17 C.F.R. § 240.10b-5, and Rule 23, F.R.Civ.P.

## TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... i

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

Failure to Disclose Over One Million Shares Would Be Tendered By Teledyne's Own Executive Orders. ..... 5

Timing Of Delivery Of The Annual Report ..... 6

The Absence Of Disclosure Regarding Earnings. ..... 6

Failure To Disclose Plans For Open Market Purchases Further Reducing Outstanding Shares. ..... 8

Deviation From Established Disclosure Practices. ..... 8

REASONS FOR GRANTING THE WRIT ..... 9

1. Conflict with Supreme Court Decision—*Coopers & Lybrand v. Livesay* ..... 9

2. Conflict with [other] Supreme Court Decisions ..... 10

3. (a) Important Questions of Law and Hardship ..... 10

(b) Conflict Among the Decisions of the Circuits ..... 12

CONCLUSION ..... 18

APPENDIX A *(Huey v. Teledyne,* 662 F.2d 621) ..... 1a

APPENDIX B *(Huey v. Teledyne,* 608 F.2d 1234) ..... 1b

APPENDIX C (Orders of dismissal) ..... 1c

APPENDIX D (Constitution, U.S.) ..... 1d

APPENDIX E (15 U.S.C. § 78j) ..... 1e

APPENDIX F (15 U.S.C. § 78n(e)) ..... 1f

APPENDIX G (Rule 10 b-5) ..... 1g

APPENDIX H (Rule 23, F.R.Civ. P.) ..... 1h

APPENDIX I (Rule 41, F.R.Civ. P.) ..... 1i

## TABLE OF AUTHORITIES


CASES — PAGE

*Allied Air Freight, Inc. v. Pan Am World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846, 89 S.CT. 131, 21 L.Ed 2d 117 (1968) ..... ii, 12, 13

*Bowe v. First Denver Mortgage Investors*, 613 F.2d 798, 800 (10th Cir.), *cert. denied* ..... 10, 15

*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) ..... *passim*

*Deposit Guaranty Natl. Bank (of Jackson, Mississippi) v. Robert L. Roper, et al.*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed. 2d 427 (March 19, 1980) ..... 12

*Drake v. Southwestern Bell Telephone Co.*, 553 F.2d 1185 (8th Cir. 1977) ..... iii, 12

*Fendler v. Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975) ..... 14

*Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) ..... 11

*Hughley v. Eaton Corp.*, 572 F.2d 566 (6th Cir. 1978) ..... 12

*Marks v. San Francisco Real Estate Board*, 627 F.2d 947 (9th Cir. 1980) ..... 11, 17

*McKnight v. Blanchard*, 667 F.2d 477 (5th Cir. 1982) ..... 9

*Ruff v. Gay*, 67 F.2d 684 (5th Cir. 1933), *aff'd* 292 U.S. 25, 54 S.Ct. 608, 78 L.Ed. 1099 (1934) ..... ii, 10, 13

*Sullivan v. Pacific Indem. Co.*, 566 F.2d 444 (3d Cir. 1977) ..... 12

*Teledyne v. Huey, et al.*, U.S. Distr. Ct., Central Dist. of Calif., No. 79-1526R ..... 16

*Thomsen v. Cayser*, 243 U.S. 66; 37 S.Ct. 353, 61 L.Ed. 597 ..... ii, 10

*United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958) ..... ii, 10, 13

*Weil v. Investment/Indicators, Research & Management*, 647 F.2d 18 (1981, 9th Cir.) ..... 11, 17

| STATUTE AND RULES | PAGE |
|---|---|
| Fifth Amendment, United States Constitution | i, ii |
| Section 10(b) 15 U.S.C. § 78j(b) | ii, iii |
| Section 14(e), 15 U.S.C. § 78n(e) | ii, iii, 8 |
| Rule 23, Federal Rules of Civil Procedure | i, iii |
| Rule 41, Federal Rules of Civil Procedure | i |
| Rule 10b-5 of the Securities and Exchange Commission Regulations, 17 C.F.R. § 240.10b-5 | ii |

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1981

ROY HUEY, in behalf of himself
and all other persons similarly situated,
*Petitioner,*

vs.

TELEDYNE, INC., et al.,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## OPINIONS BELOW

Petitioner ROY HUEY is the Appellant in the aforesaid action, a securities class action case which is the subject of an Opinion of the Court of Appeals for the Ninth Circuit, entitled, *Huey* v. *Teledyne, Inc., et al.,* No. 80-5200, 662 F.2d 621 (9th Cir. Nov. 27, 1981) [*Huey II*] (Appendix A). Said Opinion affirms an order of the United States District Court for the Central District of California, Manuel L. Real, Judge Presiding, which dismissed plaintiff's action with prejudice. Said Opinion followed an appeal from an order entered by the District Court after an earlier Ninth Circuit Opinion vacating and remanding in said case (608 F.2d 1234 (9th Cir. 1979) [*Huey I* ] (Appendix B).

Appellant seeks appellate review of a May 31, 1977 interlocutory order denying certification of the class (CR 107). Review has been denied despite the repeated entry of two final

judgments in this case, first in 1977 (CR 127 and 128), vacated and remanded in *Huey I, supra,* and the second in 1980 (CR 147), affirmed in *Huey II, supra.*

## JURISDICTION

There is jurisdiction of the Supreme Court to review this case on petition for certiorari; said jurisdiction rests upon 28 U.S.C. § 1254. The date of the Ninth Circuit opinion is November 27, 1981; a timely Petition for Rehearing (En Banc) was denied on February 10, 1982, and this Petition for Certiorari was filed within 90 days of that date.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment, United States Constitution
Rule 23, Federal Rules of Civil Procedure
Rule 41, Federal Rules of Civil Procedure
Section 14(e), 15 U.S.C. § 78n(e)
Section 10(b) 15 U.S.C. § 78j(b).
Rule 10b-5 of the Securities and Exchange Commission Regulations, 17 C.F.R. § 240.10b-5.

## STATEMENT OF THE CASE

The action is sought to be maintained against Respondents[4] in behalf of a class of some 5,000 persons, who tendered common stock to their own company, TELEDYNE as part of a tender offer by the company to repurchase its shares. The transaction occurred during a short period commencing on or about February 6, 1976 and ending February 27, 1976. Petitioner HUEY tendered 120 shares at $40.00 each. At the conclusion of the transaction, TELEDYNE accepted 2,534,531 shares and paid a total of $101,413,000 for the shares tendered.

[4] The Respondents are Teledyne, Inc., a corporate entity, Henry E. Singleton, George A. Roberts, George Kozmetsky, Robert C. Jackson, Arthur Rock and Claude E. Shannon.

Petitioner contends that TELEDYNE violated the anti-fraud provisions of the Federal Securities laws and together with certain insiders reaped a major windfall at the expense of all tendering shareholders, on the eve of a major rise in the trading price of TELEDYNE's shares.[5]

Petitioner filed this action on October 8, 1976, as a class action. (CR 1.)* On May 31, 1977, the District Court, Hon. Manuel L. Real, Judge, filed an order denying certification of the class, without stating its grounds for such refusal, and ordering the action proceed as an individual action. (CR 107.) Petitioner's individual case was set for trial. The defendant's Motion for Summary Judgment was fully briefed and argued; the District Court never ruled on that motion. Petitioner advised the District Court that the costs of trial would exceed the amount of his own small claim (RT 103-105), and that the death knell had sounded as to his claim. At the time set for trial of the individual claim, an order was entered dismissing without prejudice, for want of prosecution. The District Court later changed said order on July 29, 1977 (CR 127) during the appeal to a dismissal with prejudice on said ground. (Appendix C.)

The Opinion in *Huey I*, 608 F.2d 1234, vacated the order of dismissal, remanded, and refused to review the order denying certification of the class, on grounds which include that its new rule would force some small claims cases to trial. On remand, the District Court rejected Petitioner's request that his individual case should be set for trial. The Court, on February 14, 1980, entered a new order of dismissal (Appendix C) identical to the previous order, which had been vacated, except as to the grounds for dismissal. There, the District Court expressly removed the earlier finding that the dismissal was "for want of prosecution." In contrast to the former order, the new order prepared by TELEDYNE's counsel merely reads that the ". . . cause is hereby dismissed with prejudice . . ." (Appendix C.) The Court of Appeals in *Huey II*, without discussion of this difference between the two orders, concludes

---

[5] The case below was fully pretried (Pretrial Memoranda (CR 34) and Pretrial Conference Order (CR 39)).

* References to CR are to Tab Numbers in the Clerks Record.

that the second dismissal was for the same ground, and for that reason again refuses to grant appellate review of the order denying certification of the class. (Appendix A).

Material to the consideration of the questions presented is that it is admitted that on January 29, 1976, TELEDYNE issued a press release concerning its financial results for the year 1975. Following that announcement the trading price of its common shares began to rise. Previously, during the years 1972 through 1975 the market price had ranged from a low of 7⅜ to a high of 25-¼ (CR 39, p. 4.) During the period January 26 to February 5, 1976, trading ranged between 29-6 and 34-7, and thereafter continued to rise.

TELEDYNE announced an offer to purchase its shares at $40 on February 6, 1976. On the last day of the tender offer, February 27, 1976, the price of TELEDYNE common shares closed at $40.00. At its next opening, March 1, 1976, it rose to $47-6. Within a week after the February 27 close of the tender offer, the price of TELEDYNE common shares was in the $50.00 plus range. In May, 1976 it reached $62.00. The shares that TELEDYNE purchased in March with a purported premium at the $40.00 tender price were trading at $80.00 per share in July. The market had not seen TELEDYNE shares at $40.00, let alone $80.00, in the five (5) years prior to this tender offer. (Price Index, Pretrial Contentions.)

The shares TELEDYNE purchased from its shareholders thus doubled in price, and TELEDYNE obtained more than a one hundred million dollar ($100,000,000) windfall within little more than three months (3/1/76 to 7/14/76). (CR 39.)

On the day TELEDYNE announced the number of shares it would accept [March 1, 1976] the market price jumped $7.00 a share to $47 (CR 39). Petitioner infers that such an adjustment is the result of a surprising reduction in the volume of outstanding shares of the company.

The January 29, 1976 press release (CR 35)[6] was issued and certain newspapers printed selected portions of it. The news release reported a four times (4x) increase in earnings for the year 1975 as compared with 1974 ($6.09 versus $1.31). Seven days later, on February 6, 1976, TELEDYNE announced the tender for its shares at $40.00. On February 10, 1976 it mailed to shareholders the circular containing its offer. The "Offer to Purchase" consisted of 2½ printed pages. The offering circular is unusual among a decade of contemporary offerings, by reason of its brevity, with virtually no disclosures (CR 35).[7]

TELEDYNE contends that no material information need be contained in the four corner of its offering circular (CR 36). It claims its other disclosures made via press release and reports filed with the Securities and Exchange Commission is the way in which it has fulfilled its duty of disclosure to shareholders it solicited.

**Failure To Disclose Over One Million Shares Would Be Tendered By Teledyne's Own Executive Orders.**

Nowhere was it disclosed that its officers controlled a large number of shares in its Employees' Pension Plan, and could and would tender the entire 1,000,000 shares the company was committing itself to buy. TELEDYNE tendered to itself 1,194,650 shares it controlled that had not been revealed to the public; this was a TELEDYNE secret until well into the middle of Petitioner's lawsuit.

TELEDYNE's executives, whose ownership in the company would increase 22.8% by the tender, as members of the committee for Mellon Bank, trustee of the Teledyne Employees'

---

[6] TELEDYNE contends it did not release this press release in contemplation of the tender offer. The decision to tender was allegedly not made until February 6, 1976. (CR 31.)

[7] An analysis of contemporary Tender Offer Circulars was made. It demonstrates that TELEDYNE may virtually stand alone in the extent of its failure to make a meaningful attempt at disclosure, in this offering circular (discussed, *infra*).

Plan, tendered this block of shares. It was equal to the number of shares that TELEDYNE had committed itself to purchase.[8]

**Timing Of Delivery Of The Annual Report.**

The offer itself set the date of February 17, 1976 as the last day shareholders could withdraw any shares they may have tendered up to that date (CR 35, Ex. "B"). Distribution of the Annual Report for the year 1975 commenced on February 18, 1976, the day after it was too late to withdraw shares earlier tendered. (CR 14, Resp. Int. No. 4.) Any shareholder who tendered prior to February 18, 1976 did not have the benefit of the material information set forth in the Annual Report.[9] The Annual Report could not be in the hands of any shareholder for evaluation until late into the offering, approximately the last week, after many shareholders had transmitted their shares.

**The Absence Of Disclosure Regarding Earnings.**

TELEDYNE's February 1976 offering circular did not include the favorable 1975 year-end earnings report of January 29, 1976 ($6.09, 1975 vs. $1.31, 1974). Yet, a few months later, in an offering circular of April 22, 1976, for another tender offer, TELEDYNE revealed an earnings report. A few days earlier it had announced its first quarter 1976 results. (Offer to Purchase $6.00 Convertible Preferred Stock for $100.00 per share.) The disclosure there was that first quarter, March 1976, earnings per share were $2.34 versus $1.10 for March 1975. TELEDYNE disclosed a doubling of earnings in this second tender offer circular for the April 1976 offer, but failed to disclose the quadrupling of its earnings in its February 1976 Tender Offer Circular.

The February 1976 Tender Offer Circular omitted any disclosures on myriad material subjects known to the company.

---

[8] Years before, in an earlier tender offer, TELEDYNE disclosed in its circular that it was excluding shares held by "employee benefit plans" (Sept. 14, 1972 tender offer circular, CR 58, Ex. 8). When TELEDYNE was not to tender such shares, it disclosed the fact. When it would tender them in 1976, their existence was not disclosed.

[9] TELEDYNE scheduled production of the Annual Report so that it was delivered to TELEDYNE by the printer on February 17, 1976, the last day to withdraw shares tendered (CR 14). The Annual Report contained the financial statement which had not previously been provided to shareholders.

The circular was devoid of information ordinarily disclosed in common practice. Petitioner counts more than forty (40) allegedly material omissions in the circular.[10]

---

[10] Petitioner's memorandum of contentions for pretrial contains a list of these many alleged omissions which include among them the claim that TELEDYNE (1) failed to disclose any financial information, such as (a) That earnings per share for the year 1975, were more than four (4) times as much as for 1974; (b) The financial results and facts contained in the press release of January 29, 1976; (c) The facts contained in the certified financial statement of TELEDYNE, INC. for the year 1975, which was then in TELEDYNE's possession; (d) That there had been a significant turnaround in the financial position of its subsidiary, Argonaut Insurance Company, which was reported to be near insolvency in 1974; (e) That for the year 1975 net income per share per quarter showed an upward trend; (f) That for the years 1971, 1972, 1973, 1974 and 1975 net income per share showed an upward trend; (2) failed to disclose recent material developments, and immediate future plans of TELEDYNE, some of which were (a) That on February 25, 1976, two days before the Tender Offer was to conclude, the Board of Directors would declare a 3% common stock dividend; (b) That the company had plans to call its 3½% convertible subordinated debentures due in 1992 for redemption at a price of $1,023, plus interest, on April 5, 1976. Debentures having an aggregate principal amount of $15,828,585.00 were redeemd on April 15, 1976; (c) That on April 22, 1976, TELEDYNE would announce an Offer to Purchase all shares of its $6.00 Preferred Stock at a price of $100.00 per share. At that time there were 496,828 such shares outstanding. 206,665 shares were purchased, for a total cost of $20,665,500.00; (d) That on February 24, 1976, Unicoa Corporation, a principal subsidiary of TELEDYNE, INC., would make an offer to purchase all publicly held shares of its common stock at $30.00 per share; (e) That it had existing plans to acquire substantially and materially more than the 1,000,000 shares it had committed itself to take in the February 1976 Tender Offer; (f) that TELEDYNE controlled and would tender the shares of the largest single shareholder, to wit: the Employee Pension Plan and its 1.1 million shares; (3) failed to disclose the overall purpose and plan of the offer, the corporate purpose, and its motive for the Offer to Purchase; (4) failed to disclose management's assessment of TELEDYNE future earnings, and that it was anticipated that there would be a material increase in net income in the first quarter of 1976 and for the balance of the year 1976; (5) failed to disclose in the offering circular that there had been a reduction in the number of common shares, and common share equivalents outstanding, which tended to raise per share earnings; that in 1971 there was an average of 37,415,251 common shares outstanding; that by a series of offers to purchase, exchange offers and redemption and open market purchases of common shares, the average number of TELEDYNE, INC. common shares outstanding had been reduced until on December 31, 1975, there were 13,611,930 common shares outstanding, which the February 9, 1976 Offer to Purchase would itself reduce materially, by over 2,500,000 shares.

**Failure To Disclose Plans For Open Market Purchases Further Reducing Outstanding Shares.**

Further purchases at higher prices were made in the open market during the balance of 1976; over $40 million was expended by Teledyne for repurchase of its common stock from May to November, 1976.

**Deviation From Established Disclosure Practices.**

The offering circular was barren. It was a skeleton document containing little more than an outline of the terms of the offer and mechanics of tendering shares. Such information as given aided the capture of shares.[11]

Public policy demands that all disclosures by a corporation soliciting its own shares must be made in the offering circular delivered to shareholders, or contemporaneously therewith. The record reveals the contemporary practice of the corporate community pertaining to "issuer" tender offers, and demonstrates the consensus of opinion of the corporate community as to said issue.

Comparing the TELEDYNE tender offer circular to 51 others reveals that,[12] (a) it failed to discuss the number of shares outstanding, whereas, 47 of 51 had; (b) it failed to disclose shares held by employee plans; 23 of 51 mention that trusts or affiliates hold shares; (c) it failed to disclose the extent of the insiders' interests, and the effect on them; 23 of 51 so disclosed same. Here, the increase was 22.8%; (d) it failed to provide any financial information; of 51, only 2 failed to disclose any financial data. The 49 disclosed financial data, many attaching 10-K filings or five (5) year histories; (e) it failed to state the "book value" of shares, 31 stated book value,

---

[11] TELEDYNE counsel argued that Section 14(e) does not apply to a tender offer by an issuer. (Rept.Tr. pp. 92-93.) Another issue common to the class.

[12] An analysis of fifty-one (51) tender offer circulars (excluding TELEDYNE and its subsidiary, Unicoa) has been made. Fifty (50) were cash tender offers for common stock. The Record includes two (2) volumes containing all tender offer circulars that plaintiff's counsel could collect up to the time of the judgment entered below (Index to Record, page 5). These tender offers involve listed New York Stock Exchange companies that tendered for their own shares. The period examined is 1971 through 1976.

11 provided information from which it could be calculated; (f) it failed to disclose the dilution effects of the tender offer, 30 discuss dilutive or antidilutive effects of repurchasing shares; (g) it failed to discuss dividends. (A 3% stock dividend was declared toward the end of the February 1976 offer (R 439).) Twenty-nine of 51 offering circulars discuss dividends; (h) it failed to disclose the purpose of the tender offer, and source of funds to complete it. Of 51, only 3 fail to state some sort of purpose, 44 disclose the source of funds; (i) it failed to disclose the effect of prior tender offers to repurchase shares, and the ongoing program of open market purchases; 22 disclose various types of prior repurchases of shares.

## REASONS FOR GRANTING THE WRIT

There exist special and important reasons for the granting of review on writ of certiorari, in that:

1. The Huey I And II Opinions Conflict With The Supreme Court Decision in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed. 2d 351 (1978).

When granting appellate review under the death knell doctrine in the case of *McKnight v. Blanchard,* 667 F.2d 477 (5th Cir. 1982) the court noted, "In *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), the Supreme Court held that the death knell doctrine does not support appellate jurisdiction of prejudgment orders denying class certification in class actions, and the general tenor of the decision was to indicate that 1292(b) certification was the preferred method of reviewing interlocutory orders. However, neither the language nor holding of the opinion, or the views of the commentators as to its meaning, would support an argument that *Coopers & Lybrand* overruled the death knell decisions supporting appealability of an order such as the present, that effectively terminated the litigation. *See, e.g.,* Wright, Miller & Cooper, *supra,* at p. 181 (1981 Supp.)." 667 F.2d at 479, ftn. 1.

In the *Huey II* case there is no "death knell" — there is the actual death of the plaintiff's case. The *Huey* opinion prohibits appellate review at the stage of the proceedings where *Coopers & Lybrand* expressly allows such review.

2. *The* Huey *I And II Opinions Conflict With The Supreme Court Decision In United States v. Procter & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); Thomsen v. Cayser, 243 U.S. 66; 37 S.Ct. 353, 61 L.Ed. 597, Ruff v. Gay, 67 F.2d 684 (5th Cir. 1933), aff'd. 292 U.S. 25, 54 S.Ct. 608, 78 L.Ed. 1099 (1934).*

*Huey I* and *II* are contrary to *United States* v. *Procter & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), which held that the plaintiff there could obtain appellate review of an interlocutory order when it was "adamant in its refusal to obey" an order of the District Court and expressly allowed the Court to enter an order dismissing its civil complaint. It proposed the dismissal against it be entered for failure to obey. The Supreme Court observed the plaintiff ". . . was only seeking an expeditious review." This case is also like *Thomsen* v. *Cayser,* 243 U.S 66, 37 S.Ct. 353 61 L.Ed. 597, where the losing party induced the lower court to dismiss the complaint so that it could get appellate review. The Supreme Court, in denying the motion to dismiss the appeal, said, "The plaintiffs did not consent to the judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay."

3. *That Hardship Follows The Huey I Procedure Is Conceded In the Opinion Itself, And This Harsh Ninth Circuit Rule Has Created Misfortune There And In Other Circuits. The Resulting Opinions Are In Conflict With The Supreme Court Opinion In Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).*

(a) *Important Question of Law and Hardship*

*Huey I* itself speaks of the hardship it recognizes it will cause (608 F.2d at 1240). The Tenth Circuit in *Bowe* v. *First Denver Mortgage Investors,* 613 F.2d 798, 800-802 (10th Cir.), *cert. denied,* also heard arguments of "injustice" that flow from the *Huey I* rule and conceded, ". . . There is a negative effect of the decision of the Ninth Circuit in *Huey,* that is that it eliminates any review of orders which deny class certification where review may be necessary to avoid injustice . . ." But the

Court relied on *Huey*, concluding that, "Here the denial of class action review ends the litigation. Perhaps the Supreme Court did not contemplate this situation in *Livesay* . . ." The result was that the order before that Court could not be reviewed even though the class representatives' individual claims stood dismissed because it could not prosecute the matter as a small claim, and that, "necessarily ends the matter." (613 F.2d at 801-802.)

*Weil* v. *Investment/Indicators, Research & Management*, 647 F.2d 18 (1981, 9th Cir.), further assumed that there is a compulsion arising out of the Supreme Court's decision in *Coopers & Lybrand* v. *Livesay, supra,* which leads to an inability to review orders denying certification despite the fact that a final judgment has actually been entered. The result there was that the case was sent back to the trial court, and although having been reversed and remanded, review of certification was refused. The *Weil* Court noted that *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) points out that such a system of review, ". . . could be called 'piecemeal,' . . ." 647 F.2d at 27, ftn. 16.

In *Marks* v. *San Francisco Real Estate Board*, 627 F.2d 947 (9th Cir. 1980), a class earlier certified was decertified and ultimately the individual case was dismissed. On appeal the three members of the panel agreed that the dismissal was an abuse of discretion. *Id.* at 948-49. (Opinion by Larson, Judge.) The judgment was reversed and the case remanded. *Id.* at 949. Two members of the panel, declined even then to review the decertification order, believing that to do so would be inappropriate in view of the panel's reversal of the judgment supporting the appeal. *Id.* at 951-52. (Sneed, Circuit Judge, concurring in the result); *id.* at 952 (Kennedy, Circuit Judge, concurring); the *Weil* decision, *supra,* explained that a policy was being articulated in the cases, ". . . that interlocutory orders regarding certification and decertification of class actions should not be reviewed . . . when the judgment pursuant to which appeal was taken is reversed or vacated and the case remanded . . . because on remand another final judgment will eventually be entered which will support review of the order." 647 F.2d at 27.

Such hardship and confusion are contrary to the Supreme Court opinion in *Coopers & Lybrand* v. *Livesay, supra.*[13]

(b) *Conflict Among the Decisions Of The Circuits.*

*Huey I* concedes there is conflict among the Circuits as to whether the policy against piecemeal appeals precludes the appeal of an interlocutory order from a proper dismissal for failure to prosecute which results from that order. It stated: "Three circuits considered a similar question before the decision in *Coopers & Lybrand* but reached different results. None of these cases involved a claim that the interlocutory ruling prevented prosecution; apparently the parties simply refused to go forward." The Court cited *Sullivan* v. *Pacific Indem. Co.*, 566 F.2d 444 (3d Cir. 1977), *Hughley* v. *Eaton Corp.*, 572 F.2d 556 (6th Cir. 1978), and *Allied Air Freight, Inc.* v. *Pan Am World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968). The *Huey I* Opinion also said: "(a)s did the courts in *Sullivan* and *Hughley*, we decline to review the interlocutory order before us under the circumstances of this case. We agree with the court's statement in *Sullivan*. . . ." (608 F.2d at 1239.)

The weight of authority is against the Ninth Circuit present *Huey* view. The general rule, as stated by the Court of Appeals in *Drake* v. *Southwestern Bell Telephone Co.*, 553 F.2d 1185 (8th Cir. 1977), is that, "interlocutory orders merge with a final order and as such may be reviewed on appeal from a final order dismissing a case for want of prosecution." (553 F.2d at p. 1186.)

In *Drake*, the plaintiff had sued seeking damages and attorneys' fees. The trial court struck the causes of action relating to damages except for attorneys' fees. Subsequently, the action was dismissed for want of prosecution. The Court of

[13] The resulting failure to review is also contrary to the result achieved by the majority in *Deposit Guaranty Nat'l. Bank (of Jackson, Mississippi)* v. *Robert L. Roper, et al.*, 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed. 2d 427 (March 19, 1980), and the dissent there would prevent review for class representatives who would proceed to individual trials and thereby waive the right to review certification for the class by reason of the mooting under Article III of the Constitution. The *Huey* result thus conflicts with both the majority and the dissent in *Deposit Guaranty*.

Appeals considered the merits of the interlocutory order, held that said interlocutory order was erroneous, and reversed the order of dismissal.

In *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), cited in *Huey I, supra*, ". . . In the interests of efficient judicial administration. . . ," the court concluded that it should review an interlocutory stay order on the appeal from the final order dismissing the action without prejudice for lack of prosecution. The litigant did not deny that no action to avoid the dismissal was taken so that it could obtain review of an interlocutory order granting a stay, which appellant had failed to obtain by direct appeal from the order. The Court rejected the argument that it ". . . should decline to rule on the stay order 'in the interest of the orderly administration of justice.' We are warned that to consider the merits of this interlocutory order in this case would encourage all would-be appellants from interlocutory orders to do nothing, procure a dismissal, which under the present practice in the Southern District is likely to be without prejudice, which could then be appealed to this Court for review of the interlocutory order." (393 F.2d at 444.)

The *Allied* opinion stated:

> "Even though appellant could have averted dismissal of the action by seeking an extension during the 90-day period or applying to the CAB in order to exhaust administrative remedies, the dismissal is not a voluntary dismissal from which there is no appeal. *United States* v. *Procter & Gamble Co.*, 356 U.S. 377, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958); *Ruff* v. *Gay*, 67 F.2d 684 (5th Cir. 1933), aff'd 292 U.S. 25, 54 S.Ct. 608, 78 L.Ed. 1099 (1934)." (339 F.2d at 444.)

Although the appeal was from a dismissal without prejudice, review was given. The Court observed:

> ". . . dismissals with and without prejudice are equally appealable as final orders. *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794, 69 S.Ct. 824, 93 L.Ed. 1042 (1949); *Noonan* v. *Cunard Steamship Co.*, 375 F.2d 69 (2d Cir. 1967). Whether or not to dismiss on the merits is within the discretion of the district court. *Link* v.

*Wabash Railroad Co.*, 370 U.S. 626, 633, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). The nature of relief granted at the trial court's discretion does not determine whether or not a final order is appealable, although it may be a determining factor in the disposition of the appeal. Since all interlocutory orders and decrees are merged into the final order of the district court, see 6 Moore, Federal Practice, pars. 54.12 [1], 54.09 (2d ed. 1966), they may be reviewed on the appeal. *Davenport* v. *Procter & Gamble Mfg. Co.*, 241 F.2d 511, 513 A.L.R.2d 1350 (2d. Cir. 1957)." (393 F.2d at 444-445.)

4. *The Error As To MR. HUEY's Individual Small Claims Is Of Constitutional Dimension, A Denial Of Due Process and Equal Protection of the Laws Under The Fifth Amendment.*

Petitioner Huey's case was originally dismissed for want of prosecution when Petitioner relied on what was then existing Ninth Circuit law—the death knell doctrine. Appellant had advised the District Court of the indisputable fact that his case was a small individual claim and that the actual cost of prosecuting the matter in the individual trial then set for hearing would exceed the amount of his individual claim. At that time, the District Court first dismissed the action, without prejudice, for want of prosecution. Thereafter, while the case was on appeal, the District Court, upon application of the defendant-appellee TELEDYNE, amended the wording of its Order of Dismissal to show, the dismissal was to be "with prejudice." The Supreme Court's opinion in *Coopers & Lybrand* v. *Livesay, supra,* was filed during the pendency of that first appeal in this case. The Ninth Circuit then reached the decision in Huey I (Appendix), stating:

> "Our holding may force to trial some small claims to assure that the denial of class certification will be reviewed as part of a 'final decision.' . . . ordinarily, 'an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members.' *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 469, 98 S.Ct. at 2458. We have earlier reviewed such an order following a dismissal for failure to obey an order of the court *Fendler* v. *Westgate-California*

*Corp.*, 527 F.2d 1168 (9th Cir. 1975) (per curiam), but the parties cite, and we have found, no authority indicating that we have done so where a ruling on an interlocutory order in effect caused a failure to prosecute. These circumstances warrant a limited exception to the merger rule.

"We recognize that we must balance conflicting interests. The hardship in refusing review of the denial of class certification after a dismissal allegedly caused by that denial and the forcing of some small claims to trial must be measured against the incentive for dilatory failure to prosecute in the district court that would otherwise result. We conclude that the balance should be struck to discourage piecemeal appeals. Where the record shows that the denial of class certification caused the failure to prosecute, that ruling does not merge in the final judgment for purposes of appellate review, . . ." (608 F.2d at 1240.)

Accordingly, the Ninth Circuit Court of Appeals stating, " . . . because we here make an exception to a previously stated rule" (608 F.2d 1240), vacated the ruling of the District Court and therefore, upon remand, appellant HUEY was placed before the District Court as if he stood before the Court anew.

Upon remand by the Ninth Circuit in *Huey I*, and following a hearing on the matter, the District Court removed the objectionable wording of the Order of Dismissal which the Opinion in *Huey I* had found to be an insuperable obstacle to appellate review of the District Court's order denying certification of the class. The *Huey I* opinion indicated that it was creating a new rule. *Id.*, 608 F.2d 1240. The new rule is based upon its interpretation of *Coopers & Lybrand, supra.* Under the banner of purported compliance with the Supreme Court's decision, from that time forward according to the Ninth Circuit, review of orders denying certification of a class is to be denied where final judgment occurs by reason of want of prosecution. Review for the class is to be refused even where it appears that the denial of certification was the cause of the failure to prosecute. *Id., Huey I,* 608 F.2d at 1239, and *Bowe,* 613 F.2d 801-802.

Upon remand, the District Court entered its new order again dismissing the case with prejudice, but *it expressly omitted to state that the dismissal was based upon a failure to prosecute.*

(CR 144, Order of Dismissal, Feb. 14, 1980) (Appendix "C") Indeed, the District Court could not with reason issue a new Order of Dismissal for failure to prosecute since Appellant, after the remand in *Huey I,* expressly accepted the burden placed upon him by the *Huey I* decision, 608 F.2d at 1240, and repeatedly demanded, sought, and announced his willingness, to prosecute the individual small claim, irrespective of the hardship imposed, so that he could ultimately obtain appellate review of the order denying certification.[14] Appellant thus complied with the *Huey I* opinion's prerequisite for obtaining review of the order denying certification.

The District Court in its exercise of discretion refused to hear a motion to set the individual case for trial (Rept. Tr. Feb. 4, 1980 pp. 4-8). The record clearly shows that such a trial would have been perhaps the most monumental small claims trial ever presented to any district court to consider undertaking. The fact is that the litigation cost to the parties and the burden on the Court would have vastly exceeded the Appellant's own individual claim. The small claims case was literally to face a million-dollar defense.[15]

Despite the fact that the District Court specifically chose not to try the small claim and expressly entered an order of dismissal which specifically demonstrated that the Court had deleted the former impediment to review of certification, by removing the words "for failure to prosecute" from the new Order of Dismissal, the opinion filed in *Huey II* reaches an erroneous conclusion as to the state of the record. Notwithstanding the clarity of the record, the *Huey II* opinion states that:

> "In accordance with our decision in *Huey I,* the district court corrected its previous order dismissing Huey's action for failure to prosecute. Because the dismissal was proper

---

[14] (CR 141, Pft's. Opposition to Deft's. Mo. to Enter New Order of Dismissal, p. 11, lines 18-23; p. 13, lines 10-16; p. 15, line 1; p. 14, line 18, *et seq.;* Rptr. Tr. 1980, p. 5-8.)

[15] See App. Op. Brief, p. 4, for the case of *Teledyne* v. *Huey, et al.,* U.S. Distr. Ct., Central Dist. of Calif., No. 79-1526R. This action is by Respondent against Petitioner and his counsel, seeking to collect the $513,000.00 it indicates was spent on attorney's fees and costs in defending this action during the eight (8) months from filing in the District Court to the time of dismissal.

save for a technicality in the order, we find no abuse of discretion in this district court's entry of a new order dismissing Huey's action on the same ground." *Huey II,* 662 F.2d at 621. (Appendix A.)

In fact, an examination of the new order of dismissal (CR 144, Order of Dismissal, Feb. 14, 1980, "Appendix C") reveals that on its face it was not for failure to prosecute. Respectfully, the Ninth Circuit misreads the wording of the new order of dismissal. There is now a new order of dismissal in a form which constitutes a final judgment not based on failure to prosecute. The issue of denial of certification of the class was therefore squarely and properly before the Ninth Circuit for review, yet the Court refuses review.

The *Huey II* opinion sub silentio substantially narrows and alters the final judgment rule closing the circle proving said rule has been converted into an engine of destruction. When *Huey I* and *Huey II* are read together, with the decisions of the Ninth Circuit in *Weil* and *Marks, supra,* it can fairly be asked—when if ever is appellate review of orders denying class certification to occur? Is it to be said that review of certification may only be possible where the individual representative has reached the actual merits of the lawsuit, and that judgment is about to be affirmed on appeal? It harshly follows that there may never be review of orders denying certification, under the procedural system established in *Huey.* Clearly, there is to be no review of such orders in the Ninth Circuit if the case is to be vacated or reversed and remanded. (*Marks, supra,* 627 F.2d 947.) *Huey I* and *II* deny review for the class even where there are final judgments, forever foreclosing further prosecution of the individual's claim.

Surely, such a result should not be the intent of the Supreme Court in formulating its ruling in *Coopers & Lybrand* v. *Livesay, supra.* The goal, as expressed there, was to fortify and protect the final judgment rule; not to delay or impair review of orders where review is required for the efficient and just administration of cases. Here, a procedural carpet covers an obvious and virtually unprecedented *prima facie* violation of the federal securities law. (See pages 4-9, *supra.*)

## CONCLUSION

The Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit should be granted, and a stay should be entered pending the resolution of proceedings in the Supreme Court.

Respectfully submitted,

DAVID DAAR
MICHAEL R. NEWMAN
of MILLER & DAAR, P.C.

*Counsel of Record*

and

ERWIN SOBEL
of LAW OFFICES OF ERWIN SOBEL

By:

DAVID DAAR
*Attorneys for Petitioner*
HUEY

# Appendix

**APPENDIX A**

662 F.2d 621

Roy HUEY, in behalf of himself
and other persons similarly situated,
*Plaintiffs-Appellants,*

v.

TELEDYNE, INC., a corporate entity;
HENRY E. SINGLETON, GEORGE A. ROBERTS,
GEORGE KOSMETSKY, ROBERT C. JACKSON,
ARTHUR ROCK AND CLAUDE E. SHANNON,
*Defendants-Appellees.*

**No. 80-5200.**

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Argued and Submitted Oct. 7, 1981.
Decided Nov. 27, 1981.

**Appeal from the United States District Court
for the Central District of California.**

**Before WALLACE and TANG, Circuit Judges and
TURRENTINE,* District Judge.**

---

* The Honorable Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

**PER CURIAM:**

This matter is before us again after remand. The history of this litigation is fully chronicled in *Huey* v. *Teledyne, Inc. (Huey I)*, 608 F.2d 1234 (9th Cir. 1979). To summarize the facts, Huey's action against Teledyne, Inc. was dismissed with prejudice by the district court in 1977 for want of prosecution. Huey appealed to this court, seeking review of the dismissal and review of the district court's order denying class certification. In *Huey I*, we held that the dismissal was a proper exercise of the district court's discretion and that the interlocutory order denying class certification did not merge into the dismissal for failure to prosecute so as to be reviewable on appeal. We remanded the case, however, for technical correction of the order of dismissal and because we had made an exception to the previously stated rule that all interlocutory orders merge into the final judgment. The parties were allowed to move the district court to reconsider its order of dismissal and the district judge was given the discretion either to enter a new order or take whatever other action he deemed appropriate.

On remand, after reconsideration of its previous order, the district court entered a new order dismissing Huey's action with prejudice. Huey appeals a second time, again challenging the dismissal and seeking review of the order denying class certification.

In accordance with our decision in *Huey I*, the district court corrected its previous order dismissing Huey's action for failure to prosecute. Because the dismissal was proper save for a technicality in the order, we find no abuse of discretion in the district court's entry of a new order dismissing Huey's action on the same ground. For the reasons stated in our opinion in *Huey I*, the order denying class certification is not reviewable.

Accordingly, the judgment of the district court is AFFIRMED.

**APPENDIX B**

608 F.2d 1234

Roy HUEY et al.,
*Plaintiffs-Appellants,*

v.

TELEDYNE, INC., et al.,
*Defendants-Appellees.*

**No. 77-2604.**

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Oct. 26, 1979

DAVID DAAR, MILLER & DAAR, Beverly Hills, Cal., for plaintiffs-appellants.

GERGORY SMITH, Los Angeles, Cal., argued, for defendants-appellees; KENNETH R. HEITZ, IRELL & MANELLA, Los Angeles, Cal., on brief.

**Appeal from the United States District Court for the Central District of California.**

**Before WALLACE and TANG, Circuit Judges, and TURRENTINE,* District Judge.**

**WALLACE, Circuit Judge:**

---

* The Honorable Howard B. Turrentine, United States District Judge for the Southern District of California, sitting by designation.

Huey's suit alleging securities laws violations was dismissed for failure to prosecute and he appeals. He also seeks review of the district court's failure to certify the suit as a class action. We conclude that under the circumstances of this case the refusal to certify the class is not reviewable. Though we believe the district judge arrived at the proper result on the issue involved, the circumstances of this case require us to vacate the order of dismissal and remand the case for entry of a new order and for such further consideration, if any, as the district judge concludes is appropriate.

## I

The district judge denied Huey's motion for class certification May 31, 1977. On June 14, Huey's counsel filed an affidavit stating that the case could not proceed to trial because the cost of trial would exceed the amount of Huey's individual claim. On June 27, Huey sought certification of the class action question for appeal pursuant to 28 U.S.C. § 1292(b), which was denied. The next day Huey's case was called for trial. Huey made no appearance and the court ordered the matter dismissed for want of prosecution.[1]

In a written order filed June 30, however, the district court ordered the "cause . . . dismissed *without prejudice,* for want of prosecution." (Emphasis added.) Huey filed a notice of appeal July 1. Teledyne filed a motion for correction of the order July 13. The appeal was docketed July 19. In an order filed July 29 the district court ordered:

> That the judgment rendered by this Court dated June 28, 1977 and entered on the Court's docket on June 30,

---

[1] The transcript for June 28, 1977, shows:

THE COURT: Is there anybody here for the plaintiff?

MR. SMITH: We were advised, Your Honor—although we weren't told that he wouldn't be here, we were told that he was not going to go forward with his case.

THE COURT: The plaintiff not appearing, the matter is dismissed for want of prosecution.

1977 is amended to read as follows to conform to the Court's ruling June 28, 1977:

The above-entitled cause having been called for trial on June 28, 1977 at 9:00 A.M. and no appearance having been made by counsel for the plaintiff,

IT IS ORDERED, ADJUDGED AND DECREED that the above-entitled cause is hereby dismissed with prejudice, for want of prosecution; defendants' motions to dismiss their counterclaims are granted, such counterclaims to be dismissed without prejudice.

## II

We first determine whether the district court properly dismissed Huey's action with prejudice for failure to prosecute. This requires two inquiries: whether the district court could properly change its written dismissal of the action without prejudice to a dismissal with prejudice, and, if so, whether the court abused its discretion in so dismissing the action.

### A.

[1] Federal Rule of Civil Procedure 60(a) provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Teledyne presented its motion in the district court as one to amend the judgment pursuant to Rule 59(e). Huey argues that the motion was untimely and that the district court lacked jurisdiction to alter the judgment.

We believe the district court's action is properly characterized as a correction of an error in the order of dismissal pursuant to Rule 60(a). The June 28 ruling from the bench

dismissed the action "for want of prosecution" without qualification. Rule 41(b) specifies that such a dismissal, unless otherwise specified, operates as an adjudication upon the merits, and thus is one with prejudice. The district court's July 29 order indicated that it was made to conform to its earlier ruling.[2]

[2] This does not end our analysis. Rule 60(a) specifies that after an appeal has been docketed, leave of the appellate court is required for a correction. This appeal was docketed on July 19, before the district court's order correcting the dismissal. The district court did not seek our leave. We thus must decide whether Rule 60(a) precludes our giving effect to the correction.

It appears to us that because the district court failed to seek leave to correct its June 30 order, it was powerless to do so. *See* 6A Moore's Federal Practice ¶ 60.08[2] at 4071 (2d ed. 1974). Thus, the July 29 correction was technically invalid. We have held, however, that when a district court clearly intends to dismiss a petition, but omits to do so, and the omission falls within Rule 60(a), remand to effectuate that intent is a matter of "mere form." *Crosby* v. *Pacific S.S. Lines, Ltd.,* 133 F.2d 470, 474 (9th Cir. 1943). *See also Hamilton* v. *Stillwell Van & Storage Co.,* 343 F.2d 453, 455 (3d Cir. 1965) (per curiam); *Brown* v. *Moore,* 247 F.2d 711, 714 n. 2 (3d Cir. 1957), *cert. denied,* 355 U.S. 882, 78 S.Ct. 148, 2 L.Ed.2d 112 (1957). *See generally* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2856 at 156 & n. 66 (1973). It is evident that the same principle should apply when the district court has attempted to correct its error. *See DeVilliers* v. *Atlas Corp.,* 360 F.2d 292, 295-96 (10th Cir. 1966). Further, in this case we see

[2] Though Teledyne claims on appeal that Rule 60(a) was the applicable rule, its motion before the district court, pursuant to Rule 59(e), stated that in the June 28 ruling the court "dismissed the plaintiff's action, *without prejudice,* for want of prosecution" (emphasis added) and asked the court to specify dismissal with prejudice. Nonetheless, "[a]n appellee may urge any matter appearing in the record to support a judgment," *Waterman S.S. Corp.* v. *Gay Cottons,* 414 F.2d 724, 735 (9th Cir. 1969), and we conclude Rule 60(a), which allows the correction of errors on the court's initiative, provides such a ground.

no reason why we would have denied such leave to correct had it been properly sought. Thus, for purposes of this appeal, we consider the action to have been dismissed with prejudice.[3] We conclude that the circumstances of this case require a remand, however, so that the district court can enter a valid order.

**B.**

We next consider whether the district court properly dismissed Huey's action with prejudice for failure to prosecute. We have read Rule 41(b) "to require prosecution with 'reasonable diligence' if a plaintiff is to avoid dismissal." *Anderson* v. *Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). We need determine only whether the dismissal with prejudice constituted an abuse of the district court's discretion. *States S.S. Co.* v. *Philippine Air Lines*, 426 F.2d 803, 804 (9th Cir. 1970). This inquiry "of necessity, depends upon the facts of each case," *id.*, but we have also said that "the trial court's exercise of discretion should not be disturbed unless there is 'a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Anderson* v. *Air West, Inc., supra*, 542 F.2d at 524 (quoting *In re Josephson*, 218 F.2d 174, 182 (1st Cir. 1954)).

[3] We see no abuse of discretion in this case either at the time of the June 28 ruling or the July 29 correction. Huey's counsel's affidavit had stated that Huey could not proceed to trial. Thus, when Huey's counsel failed to appear for trial, the district court could properly conclude that Huey did not plan to go forward with his suit.

We recognize that we have required the "reasonable exploration of possible and meaningful alternatives" to a Rule 41(b) dismissal with prejudice. *Anderson* v. *Air West, Inc.*,

---

[3] We stated in *Merritt-Chapman & Scott Corp.* v. *City of Seattle, Wash.*, 281 F.2d 896 (9th Cir. 1960), *overruled on other grounds, Ruby* v. *Secretary of United States Navy*, 365 F.2d 385, 388 (9th Cir. 1966), *cert. denied*, 386 U.S. 1011, 87 S.Ct. 1358, 18 L.Ed.2d 442 (1967), that "nowhere in [Rules 60 and 73] is there given any authority for the District Court to modify its order from which the appeal was taken." *Id.* at. 899. The alteration in that case was not the correction of an error in the order. Thus, we do not read "modify" as used in that case to have referred to such corrections.

*supra,* 542 F.2d at 525; *Von Poppenheim* v. *Portland Boxing & Wrestling Comm'n,* 442 F.2d 1047, 1054 (9th Cir. 1971), *cert. denied,* 404 U.S. 1039, 92 S.Ct. 715, 30 L.Ed.2d 731 (1972). Huey argues that the trial court failed to explore such alternatives. He suggests as one alternative the certification of the class action question pursuant to 28 U.S.C. § 1292(b). The district court did consider the section 1292(b) question. Further, in Huey's written opposition to Teledyne's 59(e) motion to amend the judgment he did not mention any alternatives but merely objected that the district court lacked jurisdiction to correct the record.

In reliance on our former death knell rule for testing the finality of denials of class certification, *see Hooley* v. *Red Carpet Corp. of America,* 549 F.2d 643 (9th Cir. 1977), Huey now also urges that as part of the inquiry into "reasonable alternatives" the district judge should have considered whether other members of the class could go forward, and, alternatively, should have provided time for Huey to seek out such a class member. We reject the argument that the consideration of meaningful alternatives requires the district court, on its own motion, to conduct an inquiry into the possibility of the existence of such other members. Further, the record shows that in this case Huey did seek a continuance based in part on anticipation of a denial of class certification; that continuance was granted.

On this record, specification of dismissal without prejudice was possible but not required. "There is no requirement that every single alternate remedy be examined by the court before the sanction of dismissal is appropriate." *Anderson* v. *Air West, Inc., supra,* 542 F.2d at 525. The dismissal with prejudice was within the district court's discretion.[4]

---

[4] Huey also argues that "[i]f there are satisfactory excuses [for plaintiff's inability to proceed] the case should not be dismissed." We think the "reasonable alternative" inquiry assures that such excuses will be considered where appropriate. Further, though Huey claims that "economic unfeasibility" due to the denial of class certification is such an excuse, the ultimate inquiry centers not on an excuse's acceptability but on what alternative action by the district court will remedy the problem. Huey argues that the dismissal with prejudice was unjust in light of his inability to proceed, but we observe that a plaintiff can avoid the delay that necessarily precedes a dismissal for failure to prosecute and possibly avert a dismissal with prejudice by seeking a voluntary dismissal.

## III

[4] Finally, we consider whether we may review the district court's refusal to certify Huey's suit as a class action in view of our decision that the dismissal was a proper exercise of his discretion. The question is, in essence, whether the policy against piecemeal appeals recently expressed by the Supreme Court in *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), governs the circumstances of this case. We conclude that it does.

In *Coopers & Lybrand,* plaintiffs appealed the district court's order decertifying a class for purposes of a class action as a final judgment pursuant to 28 U.S.C. § 1291, claiming in part that the decertification sounded the "death knell" of their action. The Court concluded that the decertification order was not an appealable final order, holding that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.* at 477, 98 S.Ct. at 2462 (footnote omitted).

The policy against piecemeal appeals applies to this case even though a final judgment has been entered. Just as the policy against piecemeal appeals precludes the appeal of an order denying class certification—even where that may sound the "death knell" of an action—so it precludes, review of that order from a proper dismissal for failure to prosecute which results from that order.

Three circuits considered a similar question before the decision in *Coopers & Lybrand* but reached different results. None of these cases involved a claim that the interlocutory ruling prevented prosecution; apparently the parties simply refused to go forward. In *Sullivan* v. *Pacific Indem. Co.,* 566 F.2d 444 (3d Cir. 1977), plaintiffs refused to present any evidence at trial after their motion for class certification was denied. The court dismissed the action for failure to prosecute. On appeal the Third Circuit denied review of the class certification order, viewing "appellants' strategy as an attempt to avoid this court's firm position against interlocutory appeals of class

certification determinations." *Id.* at 445. In *Hughley* v. *Eaton Corp.*, 572 F.2d 556 (6th Cir. 1978), the district court had dismissed, though without prejudice, plaintiffs' action for want of prosecution. The Sixth Circuit stated that "plaintiffs' counsel provoked the court to dismiss the action and . . . the failure to appear at the trial date was the result of a conscious choice by plaintiffs to suffer the consequence of dismissal rather than to proceed to trial in the posture of the case as it then stood." *Id.* at 557. The court concluded that the dismissal was not an abuse of discretion and refused to review any preceding rulings holding that "the sufferance of a dismissal of a cause without prejudice is not to be employed as an avenue for reaching issues which are not subject to interlocutory appeal as of right." *Id.* In *Allied Air Freight, Inc.* v. *Pan Am. World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied,* 393 U.S. 846, 89 S.Ct. 131, 21 L.Ed.2d 117 (1968), the Second Circuit came to a different conclusion and reviewed an interlocutory stay order following a dismissal without prejudice. Appellant did "not deny that the reason that no action was taken . . . was to obtain review of the interlocutory order granting the stay." *Id.* at 444. The court rejected the argument that "to consider the merits of this interlocutory order in this case would encourage all would-be appellants from interlocutory orders to do nothing." *Id.*

As did the courts in *Sullivan* and *Hughley,* we decline to review the interlocutory order before us under the circumstances of this case. We agree with court's statement in *Sullivan :*

> "If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened. This procedural technique would in effect provide a means to avoid the finality rule embodied in 28 U.S.C.A. § 1291. To review the district court's refusal . . . under the facts of this case is to invite the inundation of appellate dockets with requests for review of interlocutory orders and to under-

mine the ability of trial judges to achieve the orderly and expeditious disposition of cases."

566 F.2d at 445-46 (quoting *Marshall* v. *Sielaff*, 492 F.2d 917, 919 (3d Cir 1974).[5]

We are aware, of course, that our holding may force to trial some small claims to assure that the denial of class certification will be reviewed as part of a "final decision." We are also aware that we have said that "[a]ll interlocutory rulings [merge] in the final judgment and are reviewable on the appeal therefrom." *Sackett* v. *Beaman*, 399 F.2d 884, 889 n. 6 (9th Cir. 1968). Thus, ordinarily, "an order denying class certification is subject to effective review after final judgment at the behest of the named plaintiff or intervening class members." *Coopers & Lybrand* v. *Livesay, supra*, 437 U.S. at 469, 98 S.Ct. at 2458. We have earlier reviewed such an order following a dismissal for failure to obey an order of the court, *Fendler* v. *Westgate-California Corp.*, 527 F.2d 1168 (9th Cir. 1975) (per curiam), but the parties cite, and we have found, no authority indicating that we have done so where a ruling on an interlocutory order in effect caused a failure to prosecute. These circumstances warrant a limited exception to the merger rule.

[5] We recognize that we must balance conflicting interests. The hardship in refusing review of the denial of class certification after a dismissal allegedly caused by that denial and the forcing of some small claims to trial must be measured against the incentive for dilatory failure to prosecute in the district court that would otherwise result. We conclude that the balance should be struck to discourage piecemeal appeals. Where the record shows that the denial of class certification caused the failure to prosecute, that ruling does not merge in the final judgment for purposes of appellate review, at least where, as here, the resulting dismissal was proper.

---

[5] The court in *Sullivan* dismissed the appeal "for lack of an appealable order." 566 F.2d at 446. In *Sullivan*, however, the order of dismissal was not challenged. *Id.* at 445. In contrast, Huey challenges not only the denial of class certification, but also the correction of the order of dismissal and the dismissal itself, although the challenges to the dismissal grow out of the hardship resulting from the denial of class certification. In these circumstances we deem the order of dismissal appealable but do not review the denial of class certification.

[6] Because we here make an exception to a previously stated rule, and because we would remand in any case for technical correction of the order of dismissal, the circumstances of this case warrant vacation of the June 28 and 30 and the July 29 rulings and return of this case to the district court. If the parties so move, the district court may reconsider the dismissal. Thus the district judge may choose either to enter a new order of dismissal or to take whatever other action he believes appropriate.

VACATED AND REMANDED.

**APPENDIX C**

The new order of dismissal in 1980 states:

> "IT IS ORDERED, ADJUDGED AND DECREED that the above-entitled cause is hereby dismissed with prejudice; defendants' Motion to Dismiss their counterclaims are granted, such counterclaims to be dismissed without prejudice." (CR 144, Order of Dismissal, Feb. 14, 1980, p. 2, 11. 1-4.)

The former 1977 order that the Court of Appeals had vacated and remanded was a dismissal "for want of prosecution." The vacated order stated:

> "IT IS ORDERED, ADJUDGED AND DECREED that the above-entitled cause is hereby dismissed with prejudice, for want of prosecution; defendants' Motion to Dismiss their counterclaims are granted, such counterclaims to be dismissed without prejudice." (CR 127, Order of Dismissal, July 29, 1977.)

## APPENDIX D

## CONSTITUTION OF THE UNITED STATES

### ARTICLE [V]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

## APPENDIX E

**15 U.S.C. § 78j.**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

## APPENDIX F

**15 U.S.C. § 78n(e)**

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

**APPENDIX G**

**SEA Rule 10b-5, 17 C.F.R. 240 .10 b-5**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

**APPENDIX H**

**Rule 23. Class Actions**

(a) PREREQUISITIES TO CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The

matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the

notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

**APPENDIX I**

**Rule 41. Dismissal of Actions.**

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

* * *

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

# Opposition

81-1689

Office - Supreme Court, U.S.
FILED
JUN 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 80-5200
IN THE

# Supreme Court of the United States

October Term, 1981

ROY HUEY, On Behalf of Himself and All Others Similarly Situated,

*Petitioners,*

*vs.*

TELEDYNE, INC., *et al.*,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION.

GREGORY R. SMITH,
KENNETH R. HEITZ,
IRELL & MANELLA,
1800 Avenue of the Stars,
Suite 900,
Los Angeles, Calif. 90067,
(213) 277-1010,
*Counsel for Respondent, Teledyne, Inc.*

WILLIAM A. MASTERSON,
ROGERS & WELLS,
260 South Figueroa Street,
Suite 400,
Los Angeles, Calif. 90067,
(213) 626-6900,
*Counsel for Individual Respondents.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS


Page

Opinions Below ..... 1

Jurisdiction ..... 2

Counterstatement of the Questions Presented ..... 2

Counterstatement of the Case ..... 3

Argument ..... 8

I.

The Court's Prior Decision in Coopers & Lybrand v. Livesay Is Controlling ..... 10

II.

The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court ..... 12

III.

There Is No Conflict Between the Circuits as to the Issue Presented Herein ..... 15

IV.

There Is No "Final Judgment" Based Upon Any Ground Other Than Petitioner's Refusal to Prosecute ..... 17

V.

Conclusion ..... 19

## TABLE OF AUTHORITIES


| Cases | Page |
|---|---|
| Allied Air Freight, Inc. v. Pan American Airways, 393 F.2d 441 (2nd Cir. 1968), cert. den. 393 U.S. 846 (1968) | 15, 16 |
| Bowe v. First of Denver Mtg. Investors, 613 F.2d 798 (10th Cir. 1978), cert. den. 447 U.S. 906 (1980) | 11, 16 |
| Cohen v. Beneficial Finance Industrial Loan Co., 337 U.S. 541 (1949) | 12 |
| Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) | 2, 4, 5, 8, 9, 10, 11, 15, 16 |
| Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) | 14, 15 |
| Drake v. Southwestern Bell Telephone Co., 553 F.2d 1185 (8th Cir. 1977) | 15, 16 |
| Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) | 2 |
| Hooley v. Red Carpet Corp., 549 F.2d 643 (9th Cir. 1977) | 3, 4, 9 |
| Huey v. Teledyne, Inc. (Huey I), 608 F.2d 1234 (9th Cir. 1979) | 1, 2, 4, 5, 6, 11, 12, 15, 16 |
| Huey v. Teledyne, Inc. (Huey II), 662 F.2d 621 (9th Cir. 1981) | 2, 7, 12, 15, 16 |
| Jones v. United States, 536 F.2d 674 (8th Cir. 1976), cert. den. 429 U.S. 1039 (1977) | 18 |
| Elsie Josephs v. Teledyne, Inc., et al., Central District of California, Civ. No. 76-4066-R | 3, 7 |
| Marks v. San Francisco Real Estate Board, 627 F.2d 947 (9th Cir. 1980) | 11 |
| Ruff v. Gay, 292 U.S. 25 (1933) | 13, 14 |
| Sullivan v. Pacific Indemnity Co., 566 F.2d 444 (3rd Cir. 1977) | 11, 16 |

Page

Tomsen v. Cayser, 243 U.S. 66 (1914) ..... 13

United States v. Proctor & Gamble Co., 356 U.S. 677 (1958) ..... 12

Weil v. Investment Indicators Research Management, Inc., 647 F.2d 18 (9th Cir. 1980) ..... 11

T. O. Yntema v. Teledyne Corporation (sic), Eastern District of Michigan, Civ. No. 672220 ..... 3

Rules, Treatise and Statutes

Federal Rule of Civil Procedure, Rule 23(c)(1) ..... ..... 11, 14, 15

Federal Rule of Civil Procedure, Rule 60(a) ..... 5

5 J. Moore's Federal Practice, §41.11[2] (2nd Ed. 1976) ..... 6

28 U.S.C. §1254(1) ..... 2

28 U.S.C. §1291(a) ..... 10

28 U.S.C. §1292(b) ..... 8, 13, 18

Securities Exchange Act of 1934, §11(e) ..... 11

No. 80-5200

IN THE

# Supreme Court of the United States

October Term, 1981

ROY HUEY, On Behalf of Himself and All Others Similarly Situated,

*Petitioners,*

*vs.*

TELEDYNE, INC., *et al.*,

*Respondents.*

## RESPONDENTS' BRIEF IN OPPOSITION.

The Respondents, defendants below, submit this brief in opposition to the petition for writ of certiorari filed by the Petitioner, and respectfully request that the petition for writ of certiorari be denied.

### Opinions Below.

This petition for certiorari concerns two related judgments entered by the United States Court of Appeals for the Ninth Circuit. In *Huey v. Teledyne, Inc.*, 608 F.2d 1234 (9th Cir. 1979) ["*Huey I*", attached as Pet. App. B], the Ninth Circuit affirmed the propriety of the United States District Court's dismissal of the complaint because of lack of prosecution, but remanded the case to the District Court for entry of a new order of dismissal or for the taking of other appropriate action. On remand, defendants renewed their motion to dismiss for want of prosecution, and the motion

was granted on February 4, 1980. Thereafter, in *Huey v. Teledyne, Inc.*, 662 F.2d 621 (9th Cir. 1981) ["*Huey II*", attached as Pet. App. A], the Ninth Circuit issued a *per curiam* opinion affirming the new order of dismissal. In both *Huey I* and *Huey II*, Petitioner sought review of the District Court's order of May 31, 1977, denying class certification, but the Ninth Circuit Court of Appeals declined to review the interlocutory class order on the basis of this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

**Jurisdiction.**

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

**Counterstatement of the Questions Presented.**[1]

a. Where class certification is denied and the named plaintiff consciously declines to proceed to trial of his individual claim as a litigation tactic designed to obtain immediate appellate review of the interlocutory class order, does the resulting order of dismissal for lack of prosecution entitle him to appellate review of the order denying certification?

---

[1]Petitioner sets forth eight "questions", many with subparts, which are purportedly presented by his Petition. It appears to Respondents that four of these (Petitioner's Questions (b), (c), (d), and (g)) are merely redundant and argumentative reiterations of Respondents' Counterstatement Question (a) herein. Two of Petitioner's questions (Petitioner's Questions (e) and (f)) are more accurately set forth (*i.e.*, without the mischaracterization of the factual premise) in the simple question posed in Respondents' Counterstatement Question (b) herein. The other two "questions" presented by Petitioner (Petitioner's Questions (a) and (h)) appear to be blatant (and extraordinarily inaccurate) attempts to inject the purported substantive merits of Petitioner's claim into the Supreme Court's consideration. Even if the propriety of the District Court's order denying class certification were at issue here, Petitioner's effort to argue the purported merits of his case would be improper. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

b. Was the second order of dismissal, entered on February 4, 1980, by the District Court based upon Petitioner's lack of prosecution?

**Counterstatement of the Case.**

The Petitioner's complaint alleging violation of the federal securities laws sought certification of a class. On May 31, 1977, the District Court denied class certification.

At the time class certification was denied, there were pending two alleged class actions which virtually replicated the allegations pleaded in Petitioner's Complaint and which included the class alleged by Petitioner.[2]

On June 14, 1977, Petitioner filed his first notice of appeal which purported to appeal from the District Court's order denying class certification. On June 14, Petitioner also filed a document entitled "Affidavit of Amount in Controversy Re Appeal From Order Denying Plaintiff's Motion to Certify the Class." The Affidavit sought to show that the District Court's order of May 31, 1977, was the "death knell" of his action, and Petitioner thus asserted that plaintiff, and his counsel, were unable to proceed to trial on this action as to plaintiff's claim alone by reason of "economic unfeasibility." This affidavit was a wholly unsuccessful attempt by Petitioner to satisfy the then applicable standard, set forth in *Hooley v. Red Carpet Corp.*, 549 F.2d 643 (9th

---

[2]*Elsie Josephs v. Teledyne, Inc., et al.*, Central District of California, Civ. No. 76-4066-R; *T.O. Yntema v. Teledyne Corporation* (sic), Eastern District of Michigan Civ. No. 672220.

Cir. 1977), for seeking an interlocutory appeal on the denial of class action status.[3]

On June 28, 1977, Petitioner refused to proceed with the trial scheduled to commence on that date, and did not even appear when the matter was called on the calendar. The District Court thereupon orally ordered the complaint "dismissed." Petitioner appealed from this order on July 1, 1977, and this appeal was docketed on July 19, 1977. The District Court's written order of June 30, 1977, inadvertently stated (contrary to the District Court's oral order of June 28) that the "cause" was "dismissed without prejudice, for want of prosecution." Respondents moved to correct this clerical error and, after hearing and argument, the District Court, on July 29, 1977, ordered that the judgment be "amended to conform to the Court's ruling of June 28, 1977." The District Court further ordered that the "cause is hereby dismissed with prejudice, for want of prosecution."

Petitioner's appeal sought review of the order denying class certification. On October 26, 1979, the Ninth Circuit filed its opinion in *Huey I*. It held:

---

[3]This tactic was always doomed to fail, since there were no grounds for application of the "death knell" exception as enunciated by the Ninth Circuit in *Hooley*, *supra*. At the time Petitioner was asserting that it was economically unfeasible for him to proceed, two other actions, referred to at n. 2, *supra*, were pending alleging identical classes. Moreover, evidence in *Huey* revealed that numerous potential claimants in the alleged class possessed claims (based on Petitioner's method of damage calculation) of between $100,000 and $1,750,000. Since *Hooley* conditioned the "death knell" exception upon a finding that "it is highly unlikely that any member of the purported class has a claim justifying separate litigation," *Hooley*, 549 F.2d at 645, Petitioner's unilateral proclamation that class denial was a "death knell" to *his* individual claim was totally insufficient to achieve interlocutory review even prior to this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-77 (1978).

(1) The District Court's dismissal of the complaint on June 28 was "with prejudice," but the written order of June 30 incorrectly specified that it was "without prejudice." The written order was corrected by the District Court on July 29, ten days after the appeal was docketed. This correction by the District Court was contrary to Fed.R.Civ.P. 60(a) which, in these circumstances, requires leave of the Court of Appeals before the correction can be made. However, the Ninth Circuit Court of Appeals noted that "we see no reason why we would have denied such leave to correct had it been properly sought [and] thus, for purposes of this appeal, we consider the action to have been dismissed with prejudice." *Huey I* at 1237.

(2) The policy against piecemeal appeals, expressed by the Supreme Court in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-77 (1978), precludes "review of the denial of class certification after a dismissal allegedly caused by that denial." *Huey I* at 1240.

Accordingly, the Court of Appeals remanded the case "for the entry of a new order and for such further consideration, if any, as the district judge concludes is appropriate." *Id.* at 1240.

On February 4, 1980, upon motion by the Respondents for the entry of a new order of dismissal for want of prosecution, based upon Petitioner's refusal to prosecute in 1977, the District Court entered a new order of dismissal with prejudice.

Petitioner's sole opposition to the entry of a new order of dismissal was an abrupt and explicit refutation of the sworn affidavit his counsel had filed in 1977 claiming that Petitioner could not proceed. Petitioner unabashedly asserted that the sole basis for his newfound opposition to Respondents' motion for a new order of dismissal was that

his earlier statement that he could not proceed due to "economic unfeasibility" was untrue and was simply a tactic to obtain a *de facto* interlocutory review of the denial of class certification; the tactic having failed, he was now prepared to proceed to trial. Petitioner stated to the District Court:

> "This was a class action. Plaintiff was searching for review of the order denying certification. The rule then in effect said economic unfeasibility spells 'death knell' . . . If the law was then what it is now plaintiff would have tried the case irrespective of economics."

The District Court properly rejected this gambitry and dismissed the action for lack of prosecution. Petitioner then appealed from the entry of the new order of dismissal. Despite the fact that Respondents' motion sought a new order of dismissal based upon Petitioner's failure to prosecute in 1977,[4] and despite the fact that the District Court explicitly stated that it was granting the motion which Respondents had made (and not some different, unidentified motion), Petitioner asserted on his appeal in the Ninth Circuit that the second order of dismissal was not for lack of

---

[4]There can be no doubt that it is Petitioner's refusal to prosecute in 1977 which is controlling. *Huey I* held that the dismissal in 1977 was proper but that the District Court, on remand, could "reconsider" its 1977 dismissal and either enter a new order of dismissal or could consider the type of alternatives (such as whether other class members might be willing to proceed) which might have been presented to it in 1977. *Huey I*, 608 F.2d at 1238. No such alternative was even suggested. Accordingly, the entry of a new order of dismissal in 1980 was both proper and in accordance with *Huey I*. That Petitioner had changed his mind and was willing to proceed in 1980 is irrelevant. Hundreds of appellate cases can be cited dealing with the propriety of a dismissal for want of prosecution. *See, e.g.*, 5 J. Moore's Federal Practice §14.11[2] (2nd ed. 1976). In almost every one of these cases the plaintiff contended (either explicitly or by implication) that he was now willing to go forward. The cases, however, focus on the conduct of the litigation and the particular events which culminate in the dismissal, and treat as wholly irrelevant the plaintiff's exp essed willingness to proceed.

prosecution. In addition, Petitioner once more sought review of the interlocutory order denying class certification.

On November 27, 1981, the Court of Appeals entered its decision in *Huey II*. It affirmed the dismissal of Petitioner's complaint and held that the order denying class certification was not reviewable. *Huey II*, 662 F.2d at 621-22 (1981).

In his statement of the case, Petitioner devotes some four pages to a summary of the purported merits of his substantive claim. Respondents do not believe that discussion has any bearing whatsoever on the issues presented to this Court. However, to assure that no misimpression be created by Petitioner's claims of securities law violation, two brief comments may be necessary. First, virtually every fact Petitioner alleged was omitted (Pet. 7, fn. 10) had been disclosed to the public in a press release issued seven days before the tender offer was announced, in other Teledyne public filings made prior to the tender, or in Teledyne's annual report which was received by Teledyne shareholders during the pendency of the tender offer. Indeed, in constructing his Complaint, Petitioner simply copied verbatim many of these publicly disclosed facts and alleged they had been omitted. Second, in light of Teledyne's disclosure of the allegedly omitted facts, summary judgment was granted in favor of Respondents as to the identical issues and tender offer in the companion *Josephs* action, referred to above at fn. 2. Consequently, the very theories of liability trumpeted before this Court as involving manipulative or deceptive conduct have already been found to be meritless.

## ARGUMENT.

In 1977, Petitioner refused to prosecute his individual claim in order to seek an appeal of the interlocutory order denying class certification. By his own admission, this decision not to proceed was a mere litigation tactic and the sworn representations to the District Court that he and his counsel could not proceed because of economics were simply false. Because of the Court of Appeals' adherence to this Court's unanimous decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469-77 (1978), Petitioner's tactic did not result in appellate review of the denial of class certification.

Petitioner now appears to seek certiorari on two alternative grounds:

(1) Petitioner seeks to wholly vitiate the holding of *Livesay* by arguing that any disappointed class representative may achieve immediate appellate review of an order denying class certification by the simple expedient of refusing to proceed with his case on the merits. (Even the "death knell" exception forbade piecemeal appeal of class denial except under carefully delineated circumstances *never* present in this case.) *Livesay* struck down the "death knell" exception and held that no interlocutory appeal of class denial was *ever* permissible (except under Section 1292(b)). *Livesay*, 437 U.S. 469-77. Petitioner would now remove *any* constraint on *de facto* interlocutory appeal. Petitioner would make it the law (or say it already is the law) that a plaintiff can *always* obtain what is in effect an interlocutory appeal by the simple expedient of refusing to proceed with his case on the merits. By this theory, Petitioner seeks to replace the discredited "death knell" exception for review of interlocutory class certification orders with an automatic review process subject to no control but the whim of a disappointed

named plaintiff.[5] The Ninth Circuit correctly applied the principles of *Livesay* in twice rejecting this tactic for obtaining *de facto* interlocutory review.

(2) Alternatively, Petitioner attempts to bootstrap the unique combination of his own dissembling representations to the District Court, the need to make a technical correction to the original order of dismissal for lack of prosecution, and the insignificant absence of the words "lack of prosecution" from the District Court's 1980 written order of dismissal, into a final judgment "on the merits" which will justify a review of class denial. Petitioner thus asserts that this house of cards posits a question worthy of certiorari.

The unique nature of this issue is readily apparent when it is stated so as to include all its interdependent factual premises. The issue then appears as follows: Does a final judgment on the merits sufficient to support appellate review of the denial of class certification result (a) where a plaintiff has refused to proceed to trial because of the denial of class certification; *and* (b) where the Court of Appeal affirms the propriety of the dismissal but remands for correction of a clerical error or the consideration of other alternatives to dismissal; *and* (c) where defendants again move on remand for a new order of dismissal because of plaintiff's lack of prosecution at the time of the first dismissal; *and* (d) where the plaintiff asserts that his prior reasons for refusing to proceed were untruthful and offers to proceed; *and* (e) where the new order of dismissal explicitly grants defendants' motion but the written order itself does not explicitly use the words "lack of prosecution." In short, does a final

---

[5]The former "death knell" exception at least contained significant safeguards against abuse. The Ninth Circuit version of the "death knell" required a special hearing and a finding that "it is highly unlikely that any member of the purported class has a claim justifying separate litigation." *Hooley*, 549 F.2d at 645.

judgment on the merits result, with respect to which the denial of class certification can be reached on appeal, upon the happening of such unique and probably never to be repeated circumstances?

Unique and unusual facts impair any general application of either alternative. As to the use of a refusal to proceed to achieve appellate review of class denial even after *Livesay*, it is significant that two other alleged class actions were pending and proceeding when this tactic was employed and that Petitioner later admitted that he had *always* been willing to proceed. These unique factors undercut any contention that the tactic of refusing to proceed was the only way to preserve the prosecution of small claims in the circumstances of this case;[6] Petitioner can hardly contend that he could *only* obtain review of the class denial by refusing to proceed (a circumstance similarly faced by all class representatives) when he now concedes that he was always able to proceed to trial. Petitioner's second theory is even more idiosyncratic, and would require this Court to decide the obvious, *i.e.*, that the District Court's entry of its second order of dismissal was for lack of prosecution.

## I.

## The Court's Prior Decision in Coopers & Lybrand v. Livesay is Controlling.

The Petitioner sought in the District Court to unilaterally declare the case "finally" over by refusing to prosecute his own claim. He thus sought a dismissal for want of prosecution as a means of obtaining review under 28 U.S.C. §1291(a) of the denial of class certification. Petitioner ac-

---

[6]The existence in the record of numerous potential claims (according to Petitioner's alleged damage calculation theory) ranging between $100,000 and $1,750,000 likewise undermines the utility of this case as a vehicle to explore the prosecution of small claims.

cordingly argues that if victorious on the class issue, he has a right to return to the District Court to prosecute his claim on the merits as though there had been no final judgment on that claim, since the dismissal of that claim, having been "caused" by the "erroneous" class denial, should also be reversed. The Petitioner thus asserts the right to unilaterally create an artificial (*i.e.*, non-binding) "finality" on the merits, solely for the purpose of triggering the premature appeal of the class question in advance of the real determination on the merits. This is exactly the "piecemeal" litigation forbidden by *Livesay*.[7] The Ninth Circuit saw it as such, and rejected this procedure. The Third and Tenth Circuits have reached the identical result in *Bowe v. First of Denver Mtg. Investors*, 613 F.2d 798, 800-02 (10th Cir. 1978), *cert. den.* 447 U.S. 906 (1980), and *Sullivan v. Pacific Indemnity Co.*, 566 F.2d 444, 445 (3d Cir. 1977). To hold otherwise would permit a plaintiff, by such voluntary action, to accomplish piecemeal appeal in *every* class action simply by refusing to proceed with the merits. The result would be a rule far more lax even than the "death knell" doctrine, the *Livesay* rule would be completely vitiated at any plaintiff's option. Accordingly, the holding in *Huey* is fully consistent with *Livesay*.[8]

---

[7]Such piecemeal appeal is extremely inappropriate in a class context, since the facts developed at trial can be significant as to the propriety of the class, and even the District Court is free to alter its class determination based on newly developed facts at any time before the decision on the merits. F.R.Civ.P. Rule 23(c)(1).

[8]Petitioner intimates that the Ninth Circuit has, in cases subsequent to *Huey I*, interpreted *Livesay* so as to impair the right to appellate review of orders denying class certification. (Pet. at 11, 17). To support this implication, Petitioner incorrectly describes *Weil v. Investment/Indicators Research Management Inc.*, 647 F.2d 18, 27 (9th Cir. 1980), and *Marks v. San Francisco Real Estate Board*, 627 F.2d 947, 951-52 (9th Cir. 1980). Both *Weil* and *Marks* are completely consistent with *Livesay*. In neither *Weil* nor *Marks* had there been a decision on the merits. In *Weil* the named plaintiff's case had been dismissed for failure to post security pursuant to Section 11(e) of the Securities Exchange

(footnote continued on following page)

## II.

## The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court.

Petitioner asserts that the Ninth Circuit decision is inconsistent with three decisions rendered by this Court twenty to fifty years ago. Those decisions do not conflict with *Huey I* or *Huey II*.

In *United States v. Procter & Gamble Co.*, 356 U.S. 677, 679-82 (1958), the United States was prosecuting a civil antitrust case and was basing the preparation of its case upon grand jury transcripts. Discovery of those transcripts was ordered and the government declined to provide them in order to assert the policy of maintaining the secrecy of such proceedings. The government's complaint was thereupon dismissed, not for failure to prosecute, but in effect as a sanction for failure to provide discovery. Thus, *Procter & Gamble* was a final judgment based directly upon the very order which formed the subject of the appeal. Moreover, it is also closely analogous to the limited "collateral order" exception authorized by *Cohen v. Beneficial Finance Industrial Loan Co.*, 337 U.S. 541, 546 (1949),[9] since publication of the grand jury transcript would have been a *fait*

---

Act of 1934; in *Marks*, the named plaintiff's individual claim was dismissed for lack of prosecution. While attacking these orders of dismissal upon appeal, the respective named plaintiffs also sought to have reviewed interlocutory orders denying class certification. The Ninth Circuit reversed and remanded as to the security bond (in *Weil*) and lack of prosecution (in *Marks*) orders; however, the Court of Appeals declined to review the class certification orders until there was a final decision on the merits. *See Weil*, 647 F.2d at 27, and *Marks*, 627 F.2d at 951-52. Both these holdings were based upon and fully consistent with the strong policy against piecemeal appeals enunciated in *Livesay* and followed in *Huey*.

[9]The Court in *Cohen* held that certain interlocutory orders are appealable where, if a final judgment is awaited, the rights involved would be irrevocably lost. *Cohen*, 337 U.S. at 546.

*accompli* if the government had complied with the order and appealed it only at the conclusion of the case.

In *Thomsen v. Cayser*, 243 U.S. 66, 83 (1914), plaintiff had prevailed in the District Court on an antitrust claim. The Court of Appeals reversed and remanded for new trial. The plaintiff moved for a rehearing requesting the Court of Appeals not to remand, but to dismiss the complaint, so that the dismissal could then be appealed. The motion was granted by the Court of Appeals. This Court approved that procedure where the parties had already hotly contested the merits in the District Court, stating that plaintiffs "did not consent to judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory." *Id.*, at p. 83. This case has nothing to do with a unilateral decision to refuse to prosecute. Plaintiff requested that the Court of Appeals enter a final judgment, rather than an interlocutory one, so that the issue could then be presented to the Supreme Court on the facts which had already been developed at trial. The Court of Appeals concurred in this procedure. This is analogous to the certification of an issue under 28 U.S.C. §1292(b), since the court has concurred in the procedure. It is far different from a situation where the plaintiff unilaterally refuses to proceed prior to trial and is then dismissed for want of prosecution.

In *Ruff v. Gay*, 292 U.S. 25 (1933), plaintiff filed a state court action which was removed to the federal court. Plaintiff's motion for remand was denied, and the suit was thereafter dismissed for want of prosecution. The issue presented to this Court was whether a receiver of a railroad appointed by a federal court sitting in equity was authorized by statute to remove from a state court an action brought against him as receiver. Neither party raised the question of whether this issue could be considered given the dismissal for lack of prosecution, and this Cou t did not consider the question.

Significantly, the issue raised in *Ruff* is purely one of law, as to which a trial would be of no assistance whatever. It is a far different situation than that presented by the denial of class certification, where the Federal Rules specifically provide that the class order may be altered at any time before a decision on the merits, Fed.R.Civ.P. 23(c)(1), and where the development of further facts can be of immense significance.[10]

While never advancing the assertion directly, Petitioner also attempts to imply in a footnote that the Court of Appeals decisions herein are somehow inconsistent with both the majority and the dissent in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). *See* Pet. 12, fn. 13. This is incorrect. In *Roper*, the named plaintiffs vigorously attempted to pursue the merits after denial of class certification. They were frustrated in their efforts, however, by a transparent defense tactic. Defendants tendered an amount sufficient to satisfy the plaintiffs' individual claims, and then argued that the named plaintiffs had no right to proceed on the merits nor to appeal the denial of class certification. The District Court entered judgment against defendants based on the rejected tender. *Roper* is the converse of this action. In *Roper*, plaintiffs sought to proceed after the denial of class certification but were prevented from doing so. Plaintiffs were denied the trial they sought — at which further facts relating to the class might be developed — and judgment was entered against them. This is far different from the present case, where Petitioner unilaterally refused to proceed to trial on the merits (at which trial further facts

---

[10]The interlocutory appeal procedure urged by Petitioner would be a complete waste of judicial effort. One wonders what the Court of Appeals is to rule, even if it were to agree that on the present showing a class is proper, since further fa tual development might dictate a contrary result.

might have been developed) on the basis of an untruthful representation as to lack of economic ability. *Roper* is perfectly consistent with both *Livesay* and the *Huey* decisions. All of these decisions emphasize the need for a plaintiff to proceed to trial after denial of class certification.

## III.

## There Is No Conflict Between the Circuits as to the Issue Presented Herein.

Petitioner cites at pages 12-13 of his Petition two cases from different circuits which are purportedly in conflict with *Huey I* and *Huey II* as to the *general* question of whether appeal of an interlocutory order can be obtained by the expedient of refusing to proceed. Neither of these cases related to the propriety of class certification, and neither is therefore even apposite to a determination as to whether class denial should be appealable after a failure to prosecute caused by that denial.

Class certification orders are uniquely interlocutory. The District Court retains the express discretionary right to alter or amend its class certification order at any time. Fed.R.Civ.P. 23(c)(1). The Advisory Committee Notes to Rule 23(c)(1) envision the fluidity of the class order by stating, "A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original decision appears unsound." The two cases cited by Petitioner, by contrast, involve subject matters as to which, by virtue of the disputed order itself, no further information can be presented. In *Drake v. Southwestern Bell Telephone Co.*, 553 F.2d 1185, 1187-88 (8th Cir. 1977), an order of dismissal of every meaningful cause of action caused the lack of prosecution. In *Allied Air Freight, Inc. v. Pan American World Airways*, 393 F.2d 441, 444 (2d Cir. 1968), *cert denied*, 393 U.S. 846 (1968),

the failure to prosecute was caused by an order which required the plaintiff to go to another forum and exhaust his administrative remedies. Neither of these decisions are inconsistent with *Huey I* and *Huey II*, which simply and explicitly hold that a plaintiff cannot simply refuse to prosecute as a tactic for immediately appealing the denial of class certification, without awaiting the development of further relevant information through trial. The decisions in *Drake* and *Allied Freight* have nothing to do with class certification, and are not indicative of what those courts might do if faced with the issue presented in *Huey*.

It is significant in this regard that *every* case which has considered the question at issue herein has held that a named plaintiff may *not* achieve review of an interlocutory order denying class certification by refusing to proceed. *See Huey I*, 608 F.2d at 1238-40; *Huey II*, 662 F.2d at 621-22; *Bowe v. First of Denver Mtg. Investors*, 613 F.2d at 800-02 (10th Cir. 1980) *cert. denied* 447 U.S. 906 (1980); *Sullivan v. Pacific Indemnity Co.*, 566 F.2d 444, 445 (3d Cir. 1977). Thus, there is *no* inconsistency among the Circuits on this issue, in part because it is a result so obviously dictated by *Livesay*. Indeed, to the extent that one might argue that *Livesay* establishes a general rule (applicable to issues other than class denial) against review of interlocutory orders, it is noteworthy that both *Drake* and *Allied Air Freight* antedate this Court's decision in *Livesay*.[11] It can hardly be a ground for arguing that there is conflict amongst the Circuits that decisions that antedate *Livesay* disagree with decisions that postdate and adhere to *Livesay*.

---

[11] *Livesay* was decided in June, 1978. The cases cited by Petitioner which purportedly authorize interlocutory appeal after a dismissal for lack of prosecution are *Drake*, decided in 1977, and *Allied Air Freight*, decided in 1968.

## IV.

## There Is No "Final Judgment" Based Upon Any Ground Other Than Petitioner's Refusal to Prosecute.

Petitioner asserts that he has been denied due process because there is a final order on the merits (instead of for lack of prosecution) which supports review of the order denying class certification. (Pet. at 14-17). Indeed, Petitioner goes so far as to suggest that the District Court intentionally structured the new dismissal so as to allow such a right of appeal. (Pet. at 16).

This argument is completely fictitious. The Respondents' motion to enter a new order of dismissal in 1980 was based entirely upon Petitioner's refusal to prosecute in 1977. The 1980 motion stated:

> "Defendants respectfully request that a new order dismissing Mr. Huey's complaint with prejudice be made and entered. The Court of Appeal held and repeatedly stated that this Court's dismissal for want of prosecution is correct."

The oral argument before the District Court in 1980 focused entirely upon Respondents' motion. The argument clearly revealed that Petitioner's 1977 excuse for not proceeding was untruthful, and that the economics involved in the prosecution of the claim had not changed since 1977. It was Respondents' motion which the District Court expressly granted, and not some other motion raised *sua sponte* by the Court. No other possible reason for dismissal exists in the record and there was no ground in Respondents' motion other than failure to prosecute. Furthermore, the case had been remanded by the Ninth Circuit with the express statement that a new order of dismissal for lack of prosecution might be made by the District Court.

In the face of these unequivocal facts, Petitioner fancifully suggests that the District Court intentionally designed a mechanism for him to achieve review. This assertion ignores that counsel for defendants drafted the order of dismissal[12] which was signed without changes and that the District Court had previously declined a request to certify the class denial order for review pursuant to 28 U.S.C. 1292(b). Moreover, the assertion ignores that no other ground was before the District Court for dismissal. Since a District Court order is always proper if a lawful rationale exists, even if such lawful rationale was not the basis for the District Court's ruling (which it was here), no basis exists to assume and treat as controlling an unstated rationale. *See Jones v. United States*, 536 F.2d 674, 682 (8th Cir. 1976) *cert. denied* 429 U.S. 1039 (1977). There is nothing in the record to support the assertion that the District Court intended to construct a mechanism, by its entry of a second order of dismissal, to allow review of its denial of the interlocutory class order. There is also nothing to suggest that this highly unique factual issue raises any question of such general or significant import as to be worthy of review by writ of certiorari.

---

[12]Petitioner concedes this fact at page 3 of his Petition for Writ of Certiorari, but thereafter ignores it, asserting instead that the District Court "expressly entered an order of dismissal which specifically demonstrated that the Court had deleted the former impediment to review of certification." Petition at 16.

## V.
## Conclusion.

For the reasons given herein, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

GREGORY R. SMITH,
KENNETH R. HEITZ,
By KENNETH R. HEITZ,
*Counsel for Respondent, Teledyne, Inc.*

IRELL & MANELLA,
*Of Counsel.*

WILLIAM A. MASTERSON,
By WILLIAM A. MASTERSON,
*Counsel for Individual Respondents.*

ROGERS & WELLS,
*Of Counsel.*